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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

TRACY A. MILLER, Plaintiff and Appellant, v. RISCHEL NGUYEN YEH, Defendant and Appellant; JACK YEH et al., Defendants and Respondents.	H038542 (Santa Clara County Super. Ct. No. CV157479)

Plaintiff Tracy Miller sold her optometry practice to defendant Rischel Nguyen Yeh. As part of this transaction, Miller lent Yeh $75,000 and defendants Jack Yeh and Trinh Nguyen (guarantors) were guarantors on the note. After a dispute arose regarding the terms of the note, Miller brought an action for breach of contract, declaratory relief, and reformation. Following a trial, the court found that the action was not barred by the statute of limitations, issued a judgment reforming the note, and awarded damages to Miller. On appeal, Yeh contends that the trial court erred when it concluded that the action was not barred by the statute of limitations. Miller has filed a cross-appeal and contends the trial court erred in concluding that there was insufficient evidence that the guarantors breached the guaranty agreement. We find no error and affirm the judgment.

I. Statement of Facts

In March 2003, Yeh made a written offer to purchase Miller's optometry practice. Miller made a counter-offer, which Yeh signed. On June 2, 2003, Miller and Yeh signed an addendum to the purchase agreement which provided, among other things, that Miller would loan Yeh $75,000.[1] The terms of the note would be payable in "72 monthly installment payments beginning 30 days after closing as follows: 12 payments interest only ($375.00); followed by 60 monthly payments of $900.43, followed by a balloon payment of $38,532.44. . . . This note shall be personally guaranteed by Jack and Rischel Yeh along with Trinh Nguyen the sister of Rischel."

On June 2, 2003, Miller and Yeh also signed escrow instructions, which provided in relevant part: "Escrow Holder shall prepare and Buyer will execute a second Note . . . in the amount of $75,000 in favor of Seller . . . per the terms of the Note as set out in Addendum 1." On the same date, Miller, Yeh, and the guarantors signed an amendment to the escrow instructions, which set forth the terms of the note, but stated that the balloon payment was due in five years. The guarantors agreed "to execute the Note and Security Agreement as additional guarantors . . . ."

However, the note did not provide for a balloon payment. It stated that Yeh would pay to Miller $75,000 as follows: "with interest from July 1, 2003 on unpaid principal at the rate of SIX (6%) per cent per annum; interest only payable monthly ($375.00), or more on the same day of each calendar month, beginning on August 1, 2003 and continuing until July 31, 2004; then principal and interest installments shall commence in the amount of: NINE HUNDRED AND 43/100 DOLLARS ($900.43), or more, beginning August 1, 2004, and continuing until July 31, 2013, at which time the balance of principal and interest then remaining unpaid shall be all due and payable in full at the

[1] We will refer to the offer, counter-offer, and the addendum collectively as the purchase agreement.

option of the holder hereof." Before Yeh and the guarantors signed the note, Miller inserted the months and days, but not the years, on the note.

Though Miller received documents from the escrow company five months after the close of escrow, she did not read the documents at that time. In April 2009, Miller was preparing her tax return and she called Yeh to confirm the amount of the balloon payment. In August 2009, Yeh refused to make the balloon payment.

Scott Daniels was the broker on the sale between Miller and Yeh. Neither Miller nor Yeh expressed any intent to him to change the terms of the note as they were reflected in the purchase agreement. It was his understanding that the terms reflected in the purchase agreement were the terms of the note.

II. Statement of the Case

On November 17, 2009, Miller filed her complaint for breach of contract against Yeh and the guarantors. The second amended complaint alleged causes of action for breach of contract, declaratory relief, and reformation of the contract.

Following trial, the trial court issued a statement of decision. The trial court found that Miller and Yeh were mutually mistaken in 2003 as to the terms in the note and that they intended the note to conform to the purchase agreement. Thus, the trial court concluded that reformation was the proper remedy and the note was modified to "state '2009' rather than '2013' as the date when 'the unpaid balance of principal and interest then remaining unpaid shall be all due and payable in full' at the seller's option." Regarding the statute of limitations defense, the trial court found that Miller first became aware of the error in the note in April 2009 and that the statute of limitations had been tolled until that time. The trial court awarded damages in the amount of $35,484.48 plus interest to Miller. The trial court also found that Miller had failed to prove that the guarantors had breached the guaranty agreement.

Yeh has filed a timely appeal. Miller has filed a timely cross-appeal.

III. Discussion

A. Appeal

Yeh does not dispute that there was substantial evidence to support the trial court's finding of mutual mistake, thereby establishing Miller's right to reformation of the note. However, she challenges the trial court's finding that the action was not barred by the statute of limitations.

"Questions concerning whether an action is barred by the applicable statute of limitations are typically questions of fact. [Citation.] But when 'the relevant facts are not in dispute, the application of the statute of limitations may be decided as a question of law. [Citation.]'" (*Sahadi v. Scheaffer* (2007) 155 Cal.App.4th 704, 713, quoting *International Engine Parts, Inc. v. Feddersen & Co.* (1995) 9 Cal.4th 606, 611-612.)

"A plaintiff must bring a claim within the limitations period after accrual of the cause of action. [Citations.]" (*Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 806.) The time for commencing an action for relief on the ground of mistake is three years. (Code Civ. Proc., § 338.) "The cause of action in that case is not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the . . . mistake." (Code Civ. Proc., § 338, subd. (d).) Courts have interpreted the statute as including "a duty to exercise diligence." (*Western Title Guar. Co. v. Sacramento & San Joaquin Drainage Dist.* (1965) 235 Cal.App.2d 815, 825.)

Federal Deposit Ins. Corp. v. Dintino (2008) 167 Cal.App.4th 333 (*F.D.I.C.*) is instructive. In that case, the defendant borrowed money from the plaintiff bank (Bank) in June 1999 to purchase a house, and the note was secured by a deed of trust on the property. (*Id.* at p. 339.) Bank mistakenly reconveyed its interest in the unpaid trust deed on the defendant's house, and the reconveyance was recorded on December 9, 1999. (*Ibid.*) In August 2000, the defendant transferred the house to a third party without paying off the note, and the deed was recorded on August 30, 2000. (*Ibid.*) The defendant also did not pay the monthly installment as of September 1, 2000, which was

subject to a late charge if not paid by September 15. (*Ibid.*) In October 2000, Bank was informed that the house had been sold. (*Id.* at pp. 339-340.) On September 5, 2003, the bank filed an action against the defendant for, among other things, unjust enrichment. (*Id.* at p. 340.)

F.D.I.C. concluded that the three-year statute of limitations of Code of Civil Procedure section 338 applied to Bank's cause of action for unjust enrichment based on mistake and that the action was timely. (*F.D.I.C.*, *supra*, 167 Cal.App.4th at p. 348.) *F.D.I.C.* reasoned: "Although [the defendant] was unjustly enriched as of December 9, 1999, because of Bank's mistaken request for recordation of the Reconveyance, application of the discovery rule to the undisputed facts in this case shows that Bank's cause of action for unjust enrichment did not begin to accrue until September 15, 2000, at the earliest. [The defendant] argues Bank should have been charged with notice of its cause of action when there were public records that effectively disclosed [his] unjust enrichment (e.g., the December 9, 1999, recordation of the Reconveyance or, at the latest, the August 30, 2000, recordation of the Grant Deed on sale of the Property). He argues a reasonable person should have suspected he may have been unjustly enriched, and had a duty to investigate, on the recordation of either the Reconveyance or the Grant Deed. However, there is no logical reason to charge a reasonable person in Bank's position with a duty to investigate based solely on the mistake that resulted in [the defendant's] alleged unjust enrichment. Bank's mistake was its mistaken request that the Trust Deed Trustee record the Reconveyance. To charge Bank with knowledge of that mistake would be inherently inconsistent with the fundamental reasoning for an equitable cause of action for unjust enrichment based on mistake. (Cf. *Tarke v. Bingham* (1898) 123 Cal. 163, 164-165 . . . [cause of action based on mistake in mortgage's description of promissory note began to accrue on plaintiff's discovery of the mistake, rather than on the date of the mistake].) Although a plaintiff generally has a duty to show diligence and investigation based on sources of information

available to him or her, '[w]here no duty is imposed by law upon a person to make inquiry, and where under the circumstances "a prudent man" would not be put upon inquiry, the mere fact that means of knowledge are open to a plaintiff, and he has not availed himself of them, does not debar him from relief when thereafter he shall make actual discovery. The circumstances must be such that the inquiry becomes a duty, and the failure to make it a negligent omission.' (*Id.* at p. 166.) In *Tarke*, the court concluded: 'In this case, though means of information were open to the plaintiff, it does not appear that there was any duty devolving upon him to make use of them. Nothing had occurred to excite his suspicion, or to put him upon inquiry . . . .' (*Ibid.*)" (*F.D.I.C.*, at p. 352.)

Similarly, here, Miller's mistake was her mistaken belief that the note contained a balloon payment. As in *F.D.I.C.*, to charge her "with knowledge of that mistake would be inherently inconsistent with the fundamental reasoning for an equitable cause of action for [reformation] based on mistake." (*F.D.I.C.*, *supra*, 167 Cal.App.4th at p. 352.) Moreover, given her initial mistake, a reasonably prudent person would not have reread the promissory note in a packet of documents that were sent to her five months later. However, when Miller was preparing her taxes in April 2009, she was charged with a duty to conduct further investigation. It was only then that Miller discovered, and should have reasonably discovered, her reformation cause of action against Yeh. Since Miller filed her complaint on November 17, 2009, the trial court properly concluded that it was not barred by the three-year statute of limitations. (Code Civ. Proc., § 338.)

Yeh contends that *F.D.I.C.* is factually distinguishable from the present case. She asserts that *F.D.I.C.* "determined that there was no duty to travel to recorder's offices to review the status of the creditor's security instruments and/or the borrower's continued ownership of the liened property, even though they were publicly open and available, because that would have imposed an absurd duty on secured creditors to constantly monitor public records to make sure their security instruments have not been mistakenly

reconveyed or that their borrowers have not somehow disposed of the real property without satisfying the creditor's lien." Thus, she argues that, in contrast to Bank in *F.D.I.C.*, Miller had in her possession all the information necessary to alert her that the note did not contain a balloon payment.

In *F.D.I.C.*, the defendant argued, among other things, that the sale of the property, which was recorded on August 30, 2000 by grant deed, was sufficient to put Bank on notice that it had an unjust enrichment claim based on mistake. (*F.D.I.C.*, *supra*, 167 Cal.App.4th at p. 353.) In response to this argument, *F.D.I.C.* pointed out that the reconveyance had been mistakenly recorded on December 9, 1999, and thus Bank was not notified of the sale. It was in this context that F.D.I.C. declined "to impose on Bank a duty to continually monitor all public records to determine whether it may have a cause of action against [the defendant] (or any other borrower) for unjust enrichment based on mistake." (*Ibid*.)

Engebrecht v. Shelton (1945) 69 Cal.App.2d 151 (*Engebrecht*) also supports our conclusion that the present action was not barred by the statute of limitations. In *Engebrecht*, the defendants purchased real property from the plaintiff in 1940. (*Id.* at p. 154.) Since the note and deed of trust differed from the parties' agreement, the trial court issued a judgment reforming the note and deed of trust due to the parties' mutual mistake. (*Id.* at pp. 152-153.) The defendant argued that the action was barred by the statute of limitations. (*Id.* at p. 154.) However, though the note and deed of trust had been in the plaintiff's possession for several years before he filed his action in June 1944, the trial court concluded that the plaintiff did not discover the mistake until February 1944 and consequently the action was timely. (*Ibid.*) The Court of Appeal also rejected the defendants' argument. *Engebrecht* reasoned that "'[w]hether the failure to discover a mistake in a written document is inexcusable negligence so as to bar a party from the right to reformation is a question of fact for the trial court. "It has been frequently decided that the mere failure of a party to read an instrument with sufficient attention to

perceive an error or defect in its contents will not prevent its reformation at the instance of the party who executes it carelessly." [Citations.]' " (*Id.* at pp. 154-155.) As in *Engebrecht*, here, the trial court's finding that Miller was diligent in discovering the error in the note was supported by Miller's testimony.

B. Cross-appeal

Miller contends that the trial court erred by concluding that the personal guaranty was not enforceable. She argues that "[c]hanging the note to accurately reflect YEH's promise can have no legal effect on the promise of the Guarantors to guarantee YEH's performance." We disagree.

"A surety or guarantor is one who promises to answer for the debt, default, or miscarriage of another, or hypothecates property as security therefor." (Civ. Code, § 2787.)

"The guarantor's obligation rests on the contract of guaranty, not on the note itself, and an action against the guarantor must be brought on the contract of guaranty. [Citations.] Nevertheless, the guaranty and the note 'must be construed to be but one instrument, constituting a single contract, upon which the liability of the guarantor, to the extent of its obligation, [is] commensurate with that of the maker of the note.' [Citations.]" (*Niederer v. Ferreira* (1987) 189 Cal.App.3d 1485, 1505.)

Here, there was no contract of guaranty. Instead, the guarantors signed the note which did not include the balloon payment. Thus, the guarantors were liable in the event that Yeh failed to make a monthly payment pursuant to the terms of the 10-year note. Since the guarantors never agreed to liability in the event that Yeh failed to make the balloon payment six years after the close of escrow, the trial court correctly concluded that they were not liable as guarantors.

Miller also contends that "the trial court incorrectly required 'conclusive' proof, which is an incorrect standard of proof; no substantial evidence was offered to negate

Miller's claim and evidence that the guarantors signed the note with the same mistake as did Yeh." (Capitalization & boldface omitted.)

Civil Code section 3399 authorizes the revision of a written contract when "through . . . a mutual mistake of the parties, . . . [the] contract does not truly express the intention of the parties . . . ."

The trial court stated: "Plaintiff nevertheless asks the court, in essence, to impute the mutual mistake of buyer and seller regarding the terms of the note to Guarantors, but the evidence is insufficient to show that Guarantors were laboring under the same mistake of fact." In a footnote, the trial court stated: "Plaintiff points out to some persuasive effect that Guarantors' signatures on escrow instructions—which provide that the seller may at her option call due the balance of unpaid principal/interest '*five* years from close of escrow date'—reflect that they specifically contemplated a future balloon payment. . . . It bears mention that the quoted language from the escrow instructions conflicts with the *72-month* balloon payment term stated in the buyer/seller Purchase Agreement. In any event, the escrow instructions do not constitute a contract of guaranty and ultimately Guarantors' signatures thereon do not conclusively establish that they were privy to errors in the promissory note."

In our view, the trial court's use of the word "conclusively" in this context did not alter Miller's burden of proof. The trial court was merely noting that the amendment to the escrow instructions did not constitute a guaranty agreement, and since it did not accurately reflect the terms of the purchase agreement, it could not have informed the guarantors that the note was inaccurate.

Moreover, the evidence does not support Miller's claim that the guarantors signed the note with the same mistake as Yeh. Trinh Nguyen testified that when she signed the amendment to the escrow instructions, she understood that she would be guaranteeing the terms and conditions of the note. She was also aware that the terms of the note might be amended. Thereafter, prior to signing the note, she read it, thought it was "a better

option," and recognized that if her sister could not make the payment, she could. She did not ask about the terms of the note, but assumed that it had been prepared by Miller. Jack Yeh testified that he understood that Miller and Yeh had agreed to a 10-year note due to changes in inventory. Thus, there was no evidence that the guarantors knew that the terms of the note did not accurately reflect the terms of the purchase agreement .

Miller contends, however, that the guarantors were not credible. Miller focuses on: (1) Trinh Nguyen's testimony that she "assumed" the note was correct even though Yeh had never told her that the purchase agreement had been changed; and (2) Jack Yeh's testimony that Yeh had told him that there was a change in the purchase agreement. We do not review the credibility of witnesses on appeal. (*In re Marriage of Balcof* (2006) 141 Cal.App.4th 1509, 1531.) In any event, there was no evidence that Trinh Nguyen's assumption that Miller and Yeh had changed the terms of the purchase agreement was unreasonable. Moreover, though the trial court rejected Yeh's testimony that she and Miller had agreed on a 10-year note, it does not follow that Jack Yeh's testimony was also rejected. The trial court could have reasonably concluded that Jack Yeh was credible and that he did not know that the note did not accurately set forth the parties' intent.

Miller also argues that "the guarantors did not offer substantial evidence sufficient to defeat Miller's reformation claim; Miller demonstrated by clear and convincing evidence that she was entitled to reformation as against the guarantors due to mutual mistake." (Capitalization & boldface omitted.) First, Miller, not the guarantors, had the burden of proof on the reformation cause of action. Second, as previously stated, the evidence supported the trial court's finding that the guarantors and Miller were not mutually mistaken as to the terms of the note, since there was no evidence that the guarantors knew the terms of the purchase agreement between Miller and Yeh.

IV. Disposition

The judgment is affirmed. Miller is awarded costs on appeal. Trinh Nguyen and Jack Yeh are awarded costs on cross-appeal.

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Mihara, J.

WE CONCUR:

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Premo, Acting P. J.

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Elia, J.